

STATE OF MICHIGAN
COURT OF APPEALS

RECELLULAR, INC.,

Plaintiff-Appellee,

v

ZONE WIRELESS, INC., ZONE
INTERNATIONAL COMPANY, ZONE
INVESTMENTS, INC., and NIBRAS
ROUMAYAH,

Defendants-Appellants.

UNPUBLISHED
February 22, 2007

No. 263719
Oakland Circuit Court
LC No. 04-062897-CK

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendants appeal by leave granted from a circuit court order denying their motion to set aside a default judgment for \$102,846.09 entered against individual defendant Nibras Roumayah. We reverse and remand for further proceedings.

Plaintiff's complaint, filed on December 9, 2004, alleged that it provided cellular service to defendants during March 2000 and that defendants owed \$102,846.09 on the account. The complaint alleged that Zone Wireless, Inc., went into automatic dissolution status in July 2004.

Defendants were personally served on December 27, 2004. On January 27, 2005, plaintiff requested that the court clerk enter a default against Roumayah for failure to plead or otherwise defend the action. The court clerk entered the default on January 27, 2005. On January 28, 2005, the court clerk entered a default judgment against Roumayah in the amount of \$103,046.09 (\$102,846.09 in damages and \$200 in costs). On January 31, 2005, defendants filed their answer to the complaint.

On March 22, 2005, defendants filed an emergency motion to set aside the default judgment pursuant to MCR 2.612. Defendants asserted that Roumayah was an officer and statutory agent of Zone Wireless, Inc., that he did not personally guarantee any payments, and that the complaint did not allege any reason he should be personally liable. The motion also asserted that although defense counsel filed an appearance on behalf of defendants, the court did not provide him with a true copy of the default judgment. The motion and accompanying affidavit of Roumayah did not explain why the answer was not timely filed. On June 13, 2005, Roumayah filed an additional brief in support of the motion to set aside the default judgment.

This brief addressed the requirements for setting aside a default judgment pursuant to MCR 2.603.

The trial court denied the motion to set aside the default judgment because it concluded that Roumayah did not show good cause for failing to file an answer or otherwise appear. The court did not address whether Roumayah's affidavit set forth a meritorious defense and the requirements for relief under MCR 2.612.

"This Court reviews a trial court's refusal to set aside a default or a default judgment for an abuse of discretion." *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). The ruling on the motion "is entrusted to the discretion of the trial court. Where there has been a valid exercise of discretion, appellate review is sharply limited. Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside." *Id.* (citation and internal quotation marks omitted).

Because Roumayah was personally served and the motion to set aside the default judgment was not filed within 21 days after entry of the default judgment, as required by MCR 2.603(D)(2), defendants were required to demonstrate a basis for relief under MCR 2.612. See MCR 2.603(D)(3). Although the rule indicates that relief may be granted under MCR 2.612 as an alternative, in *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 234 n 7; 600 NW2d 638 (1999), the Court cautioned that the "any reason justifying relief" provision "should not be read so as to obliterate" the requirements of MCR 2.603(D)(1) as analyzed in that case. Therefore, our analysis begins with the requirements of that rule.

MCR 2.603(D)(1) requires both "good cause" and an affidavit of meritorious defense. These are "separate inquiries." *Alken-Ziegler, supra*, p 231. However, "the strength of the defense will affect the 'good cause' showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker" *Id.*, pp 233-234. "To show good cause, a party may establish (1) a substantial defect or irregularity in the proceeding upon which the default is based, or (2) a reasonable excuse for failure to comply with the requirements that created the default" *AMCO Builders & Developers, Inc, supra*, p 95 (citation and internal quotation marks omitted).

Defendants correctly argue that plaintiff's failure to give notice of the entry of default as required by MCR 2.603(A)(2) is "a substantial irregularity in the proceeding upon which the default was based," sufficient to establish "good cause." *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992), overruled in part on other grounds, *Allied Electrical Supply Co v Tenaglia*, 461 Mich 285; 602 NW2d 572 (1999). In *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993), this Court, citing *Gavulic*, stated that "[f]ailure to notify a party of an entry of default constitutes a violation of MCR 2.603(A)(2) and is sufficient to show a substantial defect in the proceedings meriting a finding of good cause pursuant to MCR 2.603(D)." The Court held that the trial court abused its discretion by failing to set aside a default and a default judgment that stemmed from the defendant's failure to file a timely answer.

Roumayah's affidavit provides adequate facts to show a meritorious defense, particularly in light of apparent deficiencies in plaintiff's legal theory. The affidavit states that he is the statutory agent and corporate officer of Zone Wireless, Inc., that he did not personally guarantee

any payments due from Zone Wireless, Inc., to plaintiff, that at all relevant times he acted as a representative of the corporation, and that the complaint did not allege any reason that Roumayah should be personally liable for the corporation's debts. Further, plaintiff's theory that Roumayah is personally liable because of the corporation's automatic dissolution is flawed. Under former MCL 450.87, officers of a corporation that neglected to file the necessary reports and pay the required fees were liable for all debts of the corporation contracted during the period that the reports or fees were delinquent. That provision was repealed, however, "because of harshness." *Bergy Bros, Inc v Zeeland Feeder Pig, Inc*, 415 Mich 286, 297; 327 NW2d 305 (1982). The current statutory provision addressing the failure to file reports and pay fees, MCL 450.1922, does not include a similar penalty. Even under the prior statute, upon dissolution of a corporation, a corporate officer did not become liable for *pre-existing* debts. See *Honegger's & Co, Inc v Frog Valley Farm Services, Inc*, 98 Mich App 568, 569-570; 296 NW2d 314 (1980) ("this debt clearly having been incurred prior to dissolution, no personal liability therefore should attach."). Plaintiff's complaint alleges that the account balance is attributable to service in March 2000. Assuming that the corporation automatically dissolved in 2004, as plaintiff contends, the debt had already been incurred. Furthermore, MCL 450.1833(c) provides that, upon dissolution, the corporate existence continues for the purpose of winding up its affairs, which includes the payment of its debts. This suggests that the dissolution of a corporation does not make the corporate officers individually liable for the corporation's existing debts.

In addition, defendants assert, and plaintiff does not dispute, that Roumayah paid the fees and filed the reports necessary to renew the corporate existence under MCL 450.1925. Upon compliance with the requirements of that subsection, "[t]he rights of the corporation shall be the same as though a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable." MCL 450.1925(2). In *Bergy Bros, Inc, supra*, the Court examined similar statutory provisions that addressed the revival of corporate charters. The Court concluded that upon such revival, the corporate officers were not personally liable for actions performed in the name of the corporation during the period of forfeiture. *Id.*, pp 296-297. Although the present case involves a debt that was allegedly incurred before the period of forfeiture, *Bergy Bros, Inc*, indicates that reinstatement of the corporate charter may effectively remove any personal liability an officer incurred as a result of the dissolution, thereby further supporting the existence of a meritorious defense in this case.

Because Roumayah was personally served and the motion to set aside the default judgment was not filed within 21 days after the entry of the default judgment, as required by MCR 2.603(D)(2), defendants were required to demonstrate a basis for relief under MCR 2.612. See MCR 2.603(D)(3). Defendants rely on subsection (f), which applies where there is "[a]ny other reason justifying relief from the operation of the judgment."

Three requirements must be fulfilled for relief to be granted under MCR 2.612(C)(1)(f): "(1) the reason for setting aside the judgment must not fall under subsections a through e," unless "additional factors persuade the court that injustice will result if the judgment is allowed to stand," "(2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *Heugel v Heugel*, 237 Mich App 471, 478-479, 481; 603 NW2d 121 (1999) (citations omitted). "Generally, relief is granted under subsection f only

when the judgment was obtained by the improper conduct of the party in whose favor it was rendered.” *Id.*, p 479 (citations omitted).

The trial court did not reach this issue. Therefore, we remand this case to the trial court for consideration whether the requirements for relief under MCR 2.612(C)(1)(f) are present. See *Moxon v Moxon*, 475 Mich 860; 714 NW2d 287 (2006). This approach is particularly appropriate here because of lack of clarity in the record concerning whether Roumayah received notice of the default judgment in compliance with MCR 2.603(B)(4). If Roumayah did not receive notice of the default judgment, the absence of notice is pertinent to the late filing of the motion to set aside the default and default judgment and may strengthen the request for relief under MCR 2.612.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Henry William Saad

/s/ Michael J. Talbot